

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EUGENE PERALES and DEPARTMENT OF THE ARMY,  
CAMP STANLEY STORAGE FACILITY, San Antonio, TX

*Docket No. 00-961; Submitted on the Record;  
Issued March 23, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's medical benefits on the grounds that he no longer had any residuals of his 1993 employment injuries; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

The Board has duly reviewed the case record in this appeal and finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits on the grounds that appellant no longer had any residuals of his August 30, 1993 employment injury.

On September 1, 1993 appellant, then a 44-year-old land management worker, filed a traumatic injury claim alleging that on August 30, 1993 he injured his neck and back when his mowing tractor hit a deep ditch. On December 9, 1993 appellant filed a claim for a recurrence of disability.

By letter dated April 28, 1994, the Office accepted appellant's claim for a herniated nucleus pulposus at C4-5. By letter dated August 17, 1994, the Office expanded the acceptance of appellant's claim to include a lumbar sprain.

On September 22, 1998 appellant filed another recurrence of disability claim on August 27, 1998 and stopped work.

The Office received a November 1998 form report from Dr. Richard P. Wilson, a Board-certified orthopedic surgeon and appellant's treating physician, who found that appellant was disabled from work due to a herniated disc at L5-S1 that was caused by his August 30, 1993 employment injury.

In a February 5, 1998 letter, the Office advised Dr. Wilson that a herniated disc at L5-S1 had not been accepted. The Office asked Dr. Wilson to explain his diagnosis in light of the medical evidence of record, which established that there was no herniated disc of the lumbar

spine. The Office also asked Dr. Wilson to state whether there was any objective evidence that the accepted lumbar strain was currently active and causing symptoms after more than four years.

Dr. Wilson submitted a February 9, 1998 letter clarifying his diagnosis and stating that objective evidence showed that the lumbar facet and disc degeneration at L5-S1 were currently causing symptoms after more than four years.

In a November 4, 1998 notice of proposed termination of medical benefits, the Office stated that Dr. Wilson did not relate appellant's ongoing back problems to his August 30, 1993 employment injury. The Office also advised appellant to submit medical evidence supportive of his continued disability within 30 days.

By decision dated May 26, 1999, the Office terminated appellant's medical benefits based on Dr. Wilson's medical opinion. In an October 21, 1999 letter, appellant requested an oral hearing before an Office representative.

By decision dated December 3, 1999, the Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act.<sup>1</sup>

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.<sup>4</sup>

In his February 9, 1998 letter, Dr. Wilson stated:

"In regards to saying herniated nucleus pulposus this means a degenerative disc at L5-S1 entrapping the nerve root. It is not the typical herniated piece we see in acute herniation. This is a chronic condition which causes the nerve root to be pinched against the facet and the cause of the degeneration in the disc.

"This is a clarification of the diagnosis of herniated nucleus pulposus, L5-S1. It is more appropriate that we should call this a degenerative disc at L5-S1 with facet syndrome causing impingement of the nerve root in the lower lumbar spine at

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>3</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

L5-S1. In regards to whether this is typical. [Appellant] has been working very hard all his life. [Appellant] has developed an ongoing problem probably related to his job with degeneration of the disc at L5, S1 with narrowing entrapment of the nerve root but not saying that this is typical for a patient of his age but it, in relationship to the type of work that he does, is an ongoing problem where he has developed this over a period of time and would be in keeping with the type of work that he does and with his injury status.

“The cane is due to his low back definitely. There is definitely objective evidence that the accepted lumbar facet degeneration and disc degeneration at L5-S1 is currently causing symptoms after more than four years. He has sciatic back pain and positive straight leg raising and limited motion.

“X-ray evidence of degenerative disc disease and facet impingement.”

Dr. Wilson did not specifically address whether appellant had any continuing disability due to his accepted C4-5 herniated disc or lumbar strain. Rather, he provided diagnoses of lumbar facet and disc degeneration at L5-S1, which have not been accepted by the Office.

Because Dr. Wilson’s report did not provide an adequate basis for the Office’s determination that appellant ceased to have residuals of his accepted cervical disc at C4-5 or lumbar strain, the Office did not meet its burden of proof to terminate appellant’s compensation. For this reason, the issue of whether the Office properly denied appellant’s request for a hearing is moot.

The September 29, 1998 decision of the Office of Workers’ Compensation Programs is hereby reversed.

Dated, Washington, DC  
March 23, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member